

ATTORNEY GENERAL
STEPHEN E. MERRILL

DEPUTY ATTORNEY GENERAL
JEFFREY R. HOWARD

ASSOCIATE ATTORNEYS GENERAL
BRIAN T. TUCKER
ROBERT P. CHENEY, JR.

THE STATE OF NEW HAMPSHIRE



THE ATTORNEY GENERAL
CIVIL BUREAU
STATE HOUSE ANNEX
25 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

(603) 271-3658

December 29, 1988

SENIOR ASSISTANT ATTORNEYS GENERAL
LARRY M. SMUKLER
PETER T. FOLEY

ASSISTANT ATTORNEYS GENERAL
JOHN T. PAPPAS
DANIEL J. MULLEN
DAVID S. PECK
STEPHEN J. JUDGE
DOUGLAS N. JONES
SUSAN S. GEIGER
EMILY G. RICE
CHARLES T. PUTNAM
MONICA A. CIOLFI
ROBERT E. DUNN, JR.

ATTORNEYS
CLAIRE L. GREGORY
MARTHA PYLE FARRELL

PARALEGAL
SUSAN M. GUNTHER

JAN 10 1989

Michael Th. Johnson, Esquire
Merrimack County Attorney
Superior Court House
163 North Main Street
Concord, New Hampshire 03301-6397

Re: New England Hydro-Transmission Corporation; Preemptive
Effect of RSA 162-F Over Local Subdivision Regulation

Dear Attorney Johnson:

By letter of December 1, 1988 you have requested our opinion on whether the Merrimack County Register of Deeds may record without planning board approval certain lease documents which are believed to constitute subdivisions under local ordinance when the lease involves a transmission facility approved by the New Hampshire Bulk Power Site Evaluation Committee. For the reasons set forth below, it is our opinion that the Register may record such instruments.

For the purposes of this opinion, we understand the facts to be as follows. New England Hydro-Transmission Corporation (NEHTC) obtained a Certificate of Site and Facility for a 121 mile transmission line from the Bulk Power Supply Site Evaluation Committee (SEC) and the Public Utilities Commission of the State of New Hampshire (PUC) on December 8, 1986 pursuant to RSA Ch 162-F. Re: New England Hydro-Transmission Corporation, 71 N.H.P.U.C. 727 (1986). By further order of the PUC dated April 11, 1988, NEHTC was authorized to lease the 112 miles of right-of-way and transmission facilities owned by New England Power Company, thereby enabling NEHTC to effectuate the terms of the Certificate. New England Hydro-Transmission Corporation et al, ____ N.H.P.U.C. ____ (1988). When Attorney



Michael Th. Johnson, Esquire
December 29, 1988
Page 2

David Marshall for NEHTC attempted to record relevant lease instruments in the Merrimack County Registry of Deeds, Register Kathi L. Guay expressed hesitation, citing RSA 676:18, I which subjects registers to criminal liability for recording a subdivision plat that lacks planning board approval. In the view of the Register, certain of the property under lease constituted subdivisions subject to municipal planning board regulation. See, RSA 674:35. No such approvals had been sought or obtained by NEHTC. Thereafter, the opinion of this office was sought to provide guidance with respect to the recording of the lease documents.

Without determining the substantive issue as to whether the property subject to lease constitutes subdivisions under any municipal ordinance, it is our opinion that any purported regulation thereof would be ineffective in view of RSA Ch. 162-F. When the SEC and the PUC approved NEHTC's application for a Certificate, they found, in accordance with RSA 162-F:8 that "the proposed facility will not unduly interfere with the orderly development of the region ... after due consideration having been given to the views of municipal and regional planning commissions and municipal legislative bodies." Re: NEHTC, 71 N.H.P.U.C. at 755. This finding reflects the authority of those administrative bodies to regulate exhaustively with respect to the instant transmission facility.

The issue of the relationship between municipal regulation and RSA Ch. 162-F has been reviewed by the New Hampshire Supreme Court. In Public Service Company of New Hampshire v. Town of Hampton, 120 N.H. 68 (1980), the Court determined the legislative intent of RSA Ch. 162-F to be the assurance of a "comprehensive review of power plants and facility site selection". 120 N.H. at 70. The statute's requirement that the views of municipal planning commissions be considered was held by the Court to "protect() the 'public health and safety' of the residents of the various towns with respect to ... transmission lines falling under the statute". Id; See, RSA 162-F:8, I.

The New Hampshire Court has consistently held that where the State has enacted a comprehensive regulatory scheme, no local actions or ordinances will be permitted to contravene it. See, Vernet v. Town of Exeter, 129 N.H. 34, 39 (1986); Stablex Corporation v. Town of Hooksett, 122 N.H. 1091, 1102 (1982). While the local regulation at issue in the instant context is

Michael Th. Johnson, Esquire
December 29, 1988
Page 3

subdivision approval, rather than placement of transmission lines as in Town of Hampton, a similiar repugnance to State law would be occasioned were municipalities to enforce local land use ordinances so as to "undu(ly) delay" the siting of line facilities. 120 N.H. at 70. In fact, the Court has specifically found legislation to preempt municipal subdivision regulation of arrangement and coordination of streets where broad regulatory authority over highway access has been conferred to a State agency. See, J.E.D. Associate v. Sandown, 121 N.H. 317 (1981).

In the instant case, the subdivision ordinances to which RSA 674:35 refers are inapplicable to NEHTC's transmission facility. Therefore, planning board approval is not a prerequisite to the recording which NEHTC seeks. Accordingly, it is our opinion that Register Guay may record those lease instruments without fear of criminal liability, as the enforcement purpose of RSA 676:18, I would not thereby be served in this instance.

I trust that this has been responsive to your inquiry. Please do not hesitate to contact this Office if we can be of further assistance.

Sincerely,



Monica A. Ciolfi
Assistant Attorney General

MAC/daf

0-88-060